Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2014-000604-001 DT 06/22/2015

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA

SETH W PETERSON

v.

BRANDON CLAYTON RUSSELL (001)

NEAL W BASSETT

REMAND DESK-LCA-CCC
SCOTTSDALE MUNICIPAL COURT

HIGHER COURT RULING / REMAND

Lower Court Case Number M–0751–TR–2010–001732.

Defendant-Appellee Brandon Clayton Russell (Defendant) was convicted in Scottsdale Municipal Court of DUI. The State contends the trial court erred in granting Defendant a new trial. For the following reasons, this Court vacates the order of the trial court granting a new trial.

I. FACTUAL BACKGROUND.

On January 15, 2010, Defendant was cited for driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2); and racing on highways, A.R.S. § 28–708(A). After numerous continuances, the trial court finally held a jury trial on September 8 and 9, 2011 (20 months after the date of the offense). Chester Flaxmayer testified on behalf of Defendant and addressed the test of Defendant's blood sample done on January 20, 2010, using gas chromatograph No. "2003." (R.T. of Sep. 9, 2011, at 5, 14.) He testified about runs done on this machine on December 8 and 15, 2009, and March 10, 2010, the results of which showed the machine was not working properly on those dates. (*Id.* at 16–23.) Mr. Flaxmayer then gave the following opinion about the January 20, 2010, test of Defendant's blood sample:

> . . . I can't tell you that it's working properly and accurately. I can't tell you that the numbers that it generates in between are good.

(R.T. of Sep. 9, 2011, at 30.) On cross-examination, Mr. Flaxmayer testified as follows:

> Q. Mr. Flaxmayer, you just stated that you can't say that this machine was working [properly] off of this run.
>
> A. Correct.

Q. Can you say that it wasn't working properly, either?

A. No. From the limited data that I've seen, there isn't anything in the data to tell me that there had to be a problem.

. . . .

Q. Is there anything in there that indicated that there was some sort of a malfunction or error on this machine on this run?

A. No.

(R.T. of Sep. 9, 2011, at 31–32.) After presentation of the evidence and the arguments and instructions, the jurors found Defendant guilty of the (A)(2) charge and not guilty of the (A)(1) charge.

On October 19, 2011, Defendant's attorney filed a Motion To Vacate Conviction and Dismiss, or in the Alternative for a Retrial [Rule 24.2(a)]. In that Motion, Defendant's attorney alleged, "A few days before the trial in the above named and numbered case, counsel for Mr. Russell learned that some software errors had occurred on Scottsdale Gas Chromatograph, GCI #65N9042003 (#2003), before Mr. Russell's test." (Motion at 2.) The Motion noted Defendant's expert, Chester Flaxmayer testified about this information at trial and gave his opinion about this information. (Motion at 3.) The Motion further alleged as follows:

> After the conclusion of Mr. Russell's trial, defense counsel had the opportunity to consult with Mr. Flaxmayer several times, as well as a local software engineer with over 20 years experience, regarding the discovered discrepancies. It was at that time that counsel discovered that the problem causing the errors in the machine was never actually revealed, and the aforementioned software change was just the tip of the iceberg. A functionality analysis was never conducted and maintenance on #2003 was performed by an unlicensed technician, *i.e.*, Valdez.

(Motion at 4.) Defendant's attorney argued (1) this was *Brady* material that the State should have disclosed, (2) and failure to disclose was outrageous governmental conduct. Defendant's attorney contended Defendant was entitled to relief under Rule 24.2(a)(2) and (a)(3) of the Arizona Rules of Criminal Procedure.

On November 1, 2011, the State filed a Response noting Defendant's attorney had the material in question before Defendant's trial started, and that Mr. Flaxmayer discussed that information at trial. The State further argued Defendant's motion to vacate judgment under Rule 24.2 was premature because a defendant is not entitled to file such a motion until the trial court has entered a judgment. On December 1, 2011, Defendant's attorney filed a Motion for Discovery; on December 22, 2011, filed a Motion To Compel Discovery; and on March 26, 2012, filed a Motion for Evidentiary Hearing re: Defendant's Motion for New Trial.

After numerous other motions and hearings, on July 11, 2012, the trial court finally entered judgment and sentence. On September 4, 2013 (14 months later), Defendant's attorney filed a Supplemental Motion for New Trial. Another 8 months later, the trial court held an evidentiary hearing

on Defendant's motion for "New Trial, slash, Motion to Dismiss." (R.T. of May 7, 2014, at 43.) Mr. Flaxmayer again testified about machine number "GC–2003." (*Id.* at 50–51.) In addition to the test runs done on this machine on December 8 and 15, 2009, and March 10, 2010, Mr. Flaxmayer testified about runs done on August 9, 2009, September 2 and 30, 2009, December 22, 2009, January 7 and 14, 2010, February 12, 18, and 24, 2010, and May 12, 2011. (*Id.* at 55, 57–59.) Concerning a deposition transcript for a software engineer from Perkins-Elmer, the manufacturer of "#2003," Mr. Flaxmayer said the following:

> Q. [by Defendant's attorney]: Did that assist you in forming your opinion, Mr. Flaxmayer?
>
> A. I had already formed my opinion. It bolstered it and gave me information I did not already have that made my belief in my opinion stronger.

(R.T. of May 7, 2014, at 65.) Mr. Flaxmayer acknowledged he obtained this information through the *Berstein* (*Herman*) litigation. (*Id.* at 67.) Concerning his opinion, Mr. Flaxmayer said the following:

> Q. Okay. In your opinion, was this machine working accurately and reliably during the time of the defendant's test?
>
> A. I cannot tell you that it was.
>
> Q. Okay. And has—has your opinion bolstered or strengthened the ultimate conclusion regarding this machine since this trial of September of 2010 (sic)?
>
> A. Yes.

(R.T. of May 7, 2014, at 74.)

On cross-examination, Mr. Flaxmayer testified as follows:

> Q. [by the prosecutor]: [Y]ou testified whether you had an opinion whether the instrument was working reliably and accurately. And your opinion was that you could not say that it was.
>
> A. Correct.
>
> Q. And then again on Page 29, Line 6 through 9, again you offered the fact that you could not say that it was working reliably and accurately based on the issues that you discussed.
>
> A. Correct.
>
> Q. And I think, continuing on Page 31, I think you were asked converse that you couldn't testify that it wasn't working properly, you just couldn't say one way or the other.
>
> A. Correct.
>
> Q. And if I understand your testimony back on May 7th, that is still your basic opinion; is that correct?

A. Yes.

Q. In fact, I recall you being—you having testified your basic opinion has not changed from the time of the trial. Your—the basic opinion being that you can't say that the device is reliable.

A. Correct. That's the ultimate opinion.

Q. Right. And that was your testimony back on the trial back on September 9th, 2011, and that's your testimony today.

A. Correct.

(R.T. of Aug. 27, 2014, at 100–01.) Mr. Flaxmayer testified further that, with the additional information, his testimony and opinion would be the same. (*Id.* at 103, 105, 106, 121.) This information thus merely "bolstered" his opinion. (*Id.* at 106, 121.) He said he received the additional information "a couple of weeks before that trial" in connection with the *Berstein* (*Herman*) litigation and that he shared that information with Defendant's attorney a few days before the trial. (*Id.* at 107–08, 122–25.)

After Mr. Flaxmayer's testimony, the trial court heard arguments from the attorneys. (R.T. of Aug. 27, 2014, at 141, 148, 155.) At the conclusion of those arguments, the trial court granted Defendant a new trial as follows:

> So, this Court's analysis as it relates to Rule 24.1, I do find that under the circumstances the State, not—again, not any particular prosecutor, but the crime lab, did not provide discovery as required under *Brady*, as required under the Rules of Criminal Procedure. And I do find under Subsection 5 where it reads:
>
> > "For any other reason not due to the defendant's own fault the defendant has not received a fair and impartial trial."
>
> And I find that in this particular case, based on the lack of discovery provided by the Scottsdale Crime Lab, he did not receive a fair and impartial trial. And, therefore, I will order a new trial as it relates to the remaining count, which I believe is Count II.

(R.T. of Aug. 27, 2014, at 159.)

On September 2, 2014, the State filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZ. CONST. Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES.

A. *Did the trial court have jurisdiction to grant Defendant a new trial under Rule 24.1.*

As noted above, the trial court granted Defendant a new trial under Rule 24.1(c)(5) of the Arizona Rules of Criminal Procedure. The State contends the trial court did not have jurisdiction to do so. The rule provides a "motion for new trial shall be made no later than 10 days after the verdict has been rendered." Rule 24.1(b), ARIZ. R. CRIM. P. The requirement that the defendant file a motion for new trial within 10 days of the verdict is jurisdictional, thus a motion filed after the 10-day

limit has no effect, and the trial court has no jurisdiction to act on it. *State v. Ring,* 200 Ariz. 267, 25 P.3d 1139, ¶ 33 (2001) (because defendant's motion for new trial raising certain issues was untimely, the trial court had no jurisdiction to consider those claims, and the court would not address them on appeal); *State v. Saenz,* 197 Ariz. 487, 4 P.3d 1030, ¶ 6 (Ct. App. 2000) (defendant filed a motion for new trial 38 days after the verdict, which court held was untimely). In the present case, the jurors returned their verdict on September 9, 2011, so Defendant had until September 19, 2011, to file a Motion for New Trial. Instead, Defendant filed his Motion for New Trial on October 19, 2011, which was 40 days after the verdict. And because that motion was untimely, the trial court had no jurisdiction to grant relief to Defendant, thus the trial court erred as a matter of law in granting Defendant a new trial.

B. *Did the trial court have jurisdiction to grant relief to Defendant under any other rule.*

Although the trial court had no jurisdiction to grant relief to Defendant under Rule 24.1(c)(5), an appellate court is obligated to affirm the trial court when any reasonable view of the facts and law might support the judgment of the trial court, even when the trial court has reached the right result for the wrong reason. *State v. Canez,* 202 Ariz. 133, 42 P.3d 564, ¶ 51 (2002); *State v. LaGrand,* 153 Ariz. 21, 29, 734 P.2d 563, 571 (1987); *City of Phoenix v. Geyler,* 144 Ariz. 323, 330, 697 P.2d 1073, 1080 (1985); *State v. Perez,* 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984); *State v. Felix,* 234 Ariz. 118, 317 P.3d 1185, ¶ 19 n.8 (Ct. App. 2014); *State v. Chavez,* 225 Ariz. 442, 239 P.3d 761, ¶ 5 (Ct. App. 2010); *State v. Rumsey,* 225 Ariz. 374, 238 P.3d 642, ¶ 4 (Ct. App. 2010); *State v. Childress,* 222 Ariz. 334, 214 P.3d 422, ¶ 9 (Ct. App. 2009); *State v. Waicelunas,* 138 Ariz. 16, 20, 672 P.2d 968, 972 (Ct. App. 1983). In Defendant's Motion To Vacate Conviction and Dismiss, or in the Alternative for a Retrial, filed October 19, 2011, he asked for relief under Rule 24.2. Subsection (a) of that rule provides that such a motion must be filed no later than 60 days after entry of judgment and sentence, thus a trial court does not have jurisdiction to grant relief on a motion filed prior to the entry of judgment and imposition of sentence. *Saenz* at ¶ 6 (because trial court had not yet entered judgment and imposed sentence, defendant could not proceed under 24.2); *see also State v. Nordstrom,* 230 Ariz. 110, 280 P.3d 1244, ¶¶ 23–26 (2012). Because Defendant's attorney filed his motion on October 19, 2011, and the trial court did not enter judgment and sentence until July 11, 2012 (9 months later), the trial court did not have jurisdiction to consider the motion to vacate judgment previously filed on October 19, 2011.

Defendant's attorney filed a Supplemental Motion for New Trial, but he did not do so until September 4, 2013, which was 14 months after the trial court entered judgment and sentence. Because that was more than 60 days after the entry of judgment and sentence, that Supplemental Motion for New Trial did not give the trial court jurisdiction to grant relief to Defendant. Thus, to the extent it could be construed that the trial court granted Defendant relief under Rule 24.2, the trial court did not have jurisdiction to do so and would have erred as a matter of law.

C. *Assuming a defendant is entitled to file a premature Motion To Vacate Judgment and assuming such a motion then gives the trial court jurisdiction once the trial court enters judgment, did the trial court abuse its discretion in granting relief to Defendant.*

Assuming the trial court had jurisdiction to grant relief to Defendant under Rule 24.2, the question then is whether the trial court either erred or abused its discretion in doing so. That rule provides in part as follows:

> **a. Grounds for Motion.** Upon motion made no later than 60 days after the entry of judgment and sentence but before the defendant's appeal, if any, is perfected, the court may vacate the judgment on any of the following grounds:
>
> (1) That it was without jurisdiction of the action;
>
> (2) That newly discovered material facts exist, under the standards of Rule 32.1; or
>
> (3) That the conviction was obtained in violation of the United States or Arizona Constitutions.

Rule 24.2(a), ARIZ. R. CRIM. P. In his Motion filed on October 19, 2011, Defendant contended he was entitled to relief under Rule 24.2(a)(2), which allows relief based on newly-discovered evidence under the standards of Rule 32.1, which provides in part as follows:

> e. Newly discovered material facts probably exist and such facts probably would have changed the verdict or sentence. Newly discovered material facts exist if:
>
> (1) The newly discovered material facts were discovered after the trial.
>
> (2) The defendant exercised due diligence in securing the newly discovered material facts.
>
> (3) The newly discovered material facts are not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence.

Rule 32.1(e), ARIZ. R. CRIM. P.

In the present case, the trial court did not grant relief under Rule 24.2(a)(2) [and thus under Rule 32.1(e)], so it made no findings under Rule 32.1(e)(1), (2), or (3). In Defendant's Motion filed October 19, 2011, Defendant's attorney states, "A few days before the trial in the above named and numbered case, counsel for Mr. Russell learned that some software errors had occurred on Scottsdale Gas Chromatograph, GCI #65N9042003 (#2003), before Mr. Russell's test." (Motion at 2.) The Motion further states, "It was only a few days before the trial that defense counsel was made aware of any of this exculpatory evidence, during a final consultation with the defense expert, Chester Flaxmayer." (Motion at 3–4.) It thus appears the evidence in question was available prior to Defendant's trial and thus Defendant's attorney discovered much of it prior to trial. To the extent Defendant's attorney did not discover parts of the evidence until after trial, it appears Mr. Flax-

mayer knew of this evidence and merely did not fully consider it, thus Defendant's attorney did not exercise due diligence in securing this "new" evidence. Defendant thus failed to establish the requirements under either Rule 32.1(e)(1) or Rule 32.1(e)(2).

Finally, under Rule 32.1(e)(3), it appears the evidence in question was "merely cumulative or used solely for impeachment." Mr. Flaxmayer testified that this "new" evidence did not change his opinion, it merely bolstered it. Moreover, Mr. Flaxmayer's opinion was not really an opinion. He testified he could not say the machine was working properly and could not say the machine was not working properly. Thus, Mr. Flaxmayer essentially had no opinion about the machine, and the "new" evidence merely bolstered his position that he had no opinion about the machine.

Because this "new" evidence was merely impeachment evidence, it would not entitle Defendant to relief under Subsection (3) unless Defendant could show it "substantially undermine[d] testimony which was of critical significance at trial such that the evidence probably would have changed the verdict." As noted above, this "new" evidence did not change Mr. Flaxmayer's opinion. As far as how such evidence might affect the jurors, the Arizona Supreme Court has said the following:

> This is not to say that the malfunctions or the lab's failure to resolve them are irrelevant. The jury may consider the instrument's malfunctioning and the laboratory staff's related concerns when assessing the weight or credibility of the test results. This conclusion recognizes that "[c]ross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."

State v. Bernstein (*Herman*), 2015 WL 1874237, ¶ 22 (Ariz. Apr. 23, 2015), *quoting* Comment to Rule 702. The question is whether this "new" evidence is actually relevant. The definition of "relevant evidence" is as follows:

> Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.

Rule 401, ARIZ. R. EVID. The "fact [that] is of consequence in determining the action" was Defendant's BAC, which the State's evidence showed was a 0.102. The testimony presented both at trial and at the evidentiary hearing was that there were no "data drops" or mislabelings during the run for the test of Defendant's blood sample. Instead, the "data drops" and mislabelings were for test runs on days different from when Defendant's blood sample was tested. And as discussed above, Mr. Flaxmayer could not say these "data drops" and mislabelings showed the machine was or was not working properly during the testing of Defendant's blood sample; he just could not say one way or the other. Because there was no testimony relating these "data drops" and mislabelings to Defendant's test run, that "new" evidence did not make the fact of consequence in determining the action (Defendant's BAC) more or less probable than it would be without that "new" evidence. Because that "new" evidence was therefore not relevant, it would not have changed the verdict.

In his Motion filed on October 19, 2011, Defendant also contended he was entitled to relief under Rule 24.2(a)(3), which provides for relief if "the conviction was obtained in violation of the United States or Arizona Constitutions." The trial court gave its ruling as follows:

> . . . I do find that under the circumstances the State, not—again, not any particular prosecutor, but the crime lab, did not provide discovery as required under *Brady* . . . .
>
> And I find that in this particular case, based on the lack of discovery provided by the Scottsdale Crime Lab, he did not receive a fair and impartial trial.

(R.T. of Aug. 27, 2014, at 159.) The trial court thus found a *Brady* violation, which would be a violation of the United States Constitution. This Court finds two problems with the trial court's ruling.

First, it was based on "the lack of discovery provided by the Scottsdale Crime Lab." But the Scottsdale Crime Lab is not obligated to provide discovery. That obligation instead is on the State acting through the prosecutor.

Second, it appears this information was not subject to disclosure under *Brady.* In *Brady v. Maryland*, 373 U.S. 83 (1963), the Court held "the suppression by the prosecution of evidence favorable to an accused ***upon request*** violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87 (emphasis added). In *United States v. Agurs,* 427 U.S. 97 (1976), the Court held that, if the defense had not requested certain evidence, "constitutional error has been committed" only "if the omitted evidence creates a reasonable doubt that did not otherwise exist." 427 U.S. at 112. In *United States v. Bagley*, 473 U.S. 667 (1985), the Court applied that test to impeachment evidence. 473 U.S. at 682. In the present case, Defendant makes no claim that he requested the material in question. And Defendant's expert, Mr. Flaxmayer testified this "new" evidence did not change his opinion, it merely bolstered it, and as discussed above, Mr. Flaxmayer's opinion was not really an opinion, it was only that he could not say the machine was working properly and could not say the machine was not working properly. Thus, this Court concludes the material in question would not "create[] a reasonable doubt that did not otherwise exist." *Agurs,* 427 U.S. at 112. The trial court therefore erred in finding a *Brady* violation.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court did not have jurisdiction under either Rule 24.1 or Rule 24.2 to grant Defendant a new trial and thus erred as a matter of law in doing so. Further, even assuming the trial court did have jurisdiction to grant relief to Defendant, Defendant failed to establish he was entitled to relief under Rule 24.2.

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IT IS THEREFORE ORDERED vacating the order of the trial court granting Defendant a new trial.

IT IS FURTHER ORDERED remanding this matter to the Scottsdale Municipal Court for it to order the execution of the sentence it previously imposed.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT 062220151650•

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